

HEWLETT PACKARD SALES (MALAYSIA) SDN BHD

a

v.

ACTIVE TEAM MOULD ENGINEERING SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR

b

VINCENT NG J

[SUIT NO: D1-22-1966-1999]

27 SEPTEMBER 2002

CIVIL PROCEDURE: Action - Reinstatement - Appeal struck out due to non-attendance by defendant and counsel - Whether merits of appeal disclosed - Whether court ought to exercise discretion to reinstate

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This was an application by the third defendant ('D3') seeking reinstatement of an appeal ('encl. 24') which was struck out due to non-attendance of D3 and his counsel at the hearing of the same. The plaintiff objected to a reinstatement of encl. 24 because of the failure of the supporting affidavit ('encl. 29') to disclose any merits in the appeal; encl. 29 had merely stated that D3's appeal was merited.

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Held:

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[1] On the question of merits, encl. 29 only contained a general and bare statement that there were merits in the appeal, without condescending to any particulars pertaining to the question of merits or to at least state, for example, that the merits were as set out in the defence of an earlier affidavit (if notice of intention to use the same had been given). As encl. 29 was totally devoid of such particulars, there was no material presented to this court to found any exercise of the court's discretion. In any event, the court agreed with the plaintiff's submission that "even assuming that the firm of solicitors for D3 had not received encl. 24, yet D3 now has the opportunity to show that he has an arguable appeal". This, upon settled principles, was clearly fatal to the application. (pp 169 g & 170 a)

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[Application dismissed.]

Legislation referred to:

Rules of the High Court 1980, O. 14

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For the plaintiff/respondent - CP Lee; M/s Azman, Davidson & Co

For the 3rd defendant/applicant - YL Hiew; M/s G Gunaseelan & Assocs

Reported by Suresh Nathan

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*a***JUDGMENT****Vincent Ng J:**

b As the third defendant's (D3) appeal against my decision concerns a very short point pertaining the exercise of the court's discretionary powers, I shall make an earnest endeavour to write a truly brief judgment coupled with an equally serious effort to avoid discussing trite and well settled law.

Normally, an application to reinstate a matter which has been struck out is uneventful. If there is no objection from the other side, it is often reinstated as a matter of course subject to costs to the adverse side.

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d Yet nevertheless, quite occasionally a court is confronted with a vigorous objection from the opposing side. This happened in the instant case when I heard encl. 30, in which D3 had sought reinstatement of the appeal (encl. 24) which was struck out by me on 2 April 2002 due to non-attendance of D3 and his counsel at the hearing of same. Enclosure 24 was D3's appeal against the decision of the Senior Assistant Registrar (SAR) allowing the plaintiff to enter summary judgment under O. 14 of the Rules of the High Court 1980 (RHC) against D3 (the first defendant did not contest and the second defendant had earlier admitted liability on the plaintiffs claim) in the sum of RM1,244,222 (a joint liability figure) being the aggregate sum due to the plaintiff on rental of various equipment.

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The objection to a reinstatement of encl. 24 (the appeal) by the plaintiff was through its counsel, Mr CP Lee, expressed in the following terms:

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We object to the reinstatement because the supporting affidavit Lampiran 29 did not disclose any merits in the appeal. It only states that 'rayuan D3 memang bermerit'. The First Defendant (the borrower) did not contest and the Second Defendant (the other guarantor) admitted liability – only D3 now wishes to contest. Summary judgment was granted. No defence was filed and there was no notice of intention to use affidavits in respect of other applications as required under the RHC. Even assuming that they were in fact unaware of the 2/4/02 hearing of Enclosure 24, yet they now have the opportunity to show that they have an arguable appeal. In this case I now observe that they themselves rubber stamped 'Box No. 502' (Bar Council Box) and the court would have deposited Enclosure 24 in that box.

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Mr YL Hiew for D3, who chose not to file any defence, could only attempt the following reply:

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Box number chopped by us at the back of Lampiran 24 is our lower court BC Box number. I acknowledge that Lampiran 23 (notice of appeal against the SAR's decision disallowing use of an affidavit) was received by us though the same chop 'Box No. 502' was stamped on the back of Lampiran 23. Both

counsel attended the 3/4/02 hearing stated in Lampiran 23 and appeal was withdrawn. I would also ask this court to exercise its discretion under Ord 92 r. 4 of the RHC. I concede that the affidavit supporting the application for reinstatement only stated that 'rayuan D3 memang bermerit dan bukannya remeh temeh' but does not refer to paragraphs in other affidavits which deals with the question of merits.

Hence, I am seized with the duty to carefully examine the material in the application before me to determine whether to reinstate encl. 24. In an application for reinstatement two questions, in the interests of the due administration of justice, falls to be considered, namely:

- (1) whether the non-attendance at the hearing of the matter was culpable; and
- (2) whether the applicant tendered or presented sufficient material in his application, to show that he has a plausible or arguable defence/claim.

On the first question, I find the assertion of Mr Hiew, that the Bar Council Box No. 502 was in fact his firm's box number for the lower courts, smacks of negligence on the part of his firm's employees. At any rate, as he had acknowledged that an earlier encl. 23 (being the notice of appeal against the SAR's decision disallowing the use of an affidavit) was duly received by his firm though it bore the same box number stamped as 'Box No. 502', I am not at all persuaded to the view that encl. 24 did not reach his firm.

On the second question, three pre-eminently trite principles have to be borne in mind in an application for reinstatement. Firstly, an applicant could not require a court to reinstate a struck out matter as of right – it is not merely a matter of partaking in an automatic formal exercise before the judge, with the opponent as spectator. Secondly, reinstatement involves an exercise of the court's discretion. Thirdly, there must be sufficient material before the court to enable it to found the exercise of its discretion. Counsel for D3 appears to be unaware of the first two principles and has clearly breached the third. I find a serious infirmity in the affidavit supporting the application for reinstatement (encl. 29) affirmed on 12 June 2002. On the question of merits para. 7(b) of encl. 29 only contains a general and bare statement that there were merits in the appeal, without condescending to any particulars pertaining to the question of merits or to at least state, for example, that the merits are as set out in the defence or an earlier affidavit (if notice of intention to use same has been given). As encl. 29 was totally devoid of such particulars I am driven to hold that there is no material presented to this court to found any exercise of the court's discretion. In any event, I would agree with counsel for

a the plaintiff's submission that: "even assuming that the firm of solicitors for D3 had not received encl. 24 yet D3 now has the opportunity to show that he has an arguable appeal". This, in my judgment upon settled principles, is clearly fatal to the application and I dismissed encl. 30 with costs to the plaintiff.

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